(4)

No. 03-1147

MAY 24

In The

Supreme Court of the United States

DAVID M. ROEDER, ET AL.,

Petitioners,

v.

ISLAMIC REPUBLIC OF IRAN, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

REPLY BRIEF

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REPLY BRIEF OF PETITIONER

INTRODUCTION

The petition for certiorari, supported by a brief amici curiae on behalf of a bipartisan group of United States Senators, demonstrates that the court of appeals improperly imposed a "clear statement" requirement with respect to congressional abrogation of unratified executive agreements. The court of appeals' judgment effectively subordinates legislation enacted by Congress and signed by the President to unilateral executive agreements and administrative regulations. As a result, the court of appeals frustrated congressional intent that the Algiers Accords would not bar petitioners' claims against Iran, as evidenced by repeated enactment of appropriations riders during a most unusual process of congressional dialogue with the district court in this very case.

The Government's Brief in Opposition ("BIO") offers a host of irrelevancies and internal contradictions that serve only to underscore the need for certiorari. Indeed, the Government ultimately acknowledges that "an Act of Congress may have the effect of abrogating a prior international agreement even if the agreement is not specifically identified in the text of the superseding statute," (BIO 14) and that, "if the Algiers Accords were shown to conflict with subsequently enacted federal legislation, the provisions of the Act of Congress would supersede those of the executive agreement." BIO 16. Petitioners have met that standard; they have demonstrated that the legislation in this case conflicts with the Algiers Accords by authorizing the federal courts to proceed with claims against Iran arising out of the hostages' ordeal. Even the Government concedes that the federal courts have jurisdiction over such claims, at least to adjudicate challenges to the

validity of the Algiers Accords. BIO 10. As we show in Part 3, *infra*, even that limited grant of jurisdiction is inconsistent with the directive of the Algiers Accords and therefore must be taken as abrogating that executive agreement. Certiorari is therefore urgently needed.

ARGUMENT

1. The Government begins by affirming the authority of the President to settle claims of American nationals through executive agreements. BIO 8-9. That issue is a red herring. This case does not involve the Executive's power, in the abstract, to settle claims. Rather, it involves the Executive's authority to prevent a subsequent Congress from enacting legislation within its proper constitutional domain to abrogate such an executive agreement, through the interposition of a clear statement rule.

2. The Government offers little in the way of analysis to justify imposing a clear statement rule in this context. There is no dispute that the Algiers Accords represent an "exercise of purely executive power" (BIO 11), not subject to any legislative ratification. Similarly, there is no dispute that the legislation in this case lies squarely within Congress's constitutional authority. The enactments do not seek to abrogate state sovereign immunity, otherwise alter the balance of power within our system of federalism, or accomplish any other result so constitutionally problematic as to warrant a clear statement requirement under this Court's precedent. *E.g.*, *Nixon v. Missouri Municipal League*, 124 S. Ct. 1555, 1566 (2004).

The Government's argument to the contrary is premised on cases involving senatorially ratified *treaties*, rather

than unratified *executive agreements*. BIO 13. The Government thus misses the central point of petitioners' argument. For some purposes, it may well be true that an executive agreement serves as a contract between nations, as the Government insists. BIO 14. But for purposes of the American constitutional hierarchy, it is simply fallacious to consider a treaty as equivalent to an unratified executive agreement, just as it would be improper to equate a statute with an administrative regulation. In fact, the analogy is closer than one might realize, for the Algiers Accords are not self-executing and are implemented solely through administrative regulations and executive orders. *See* Exec. Order No. 12283, 46 Fed. Reg. 7927 (1981), codified at 31 C.F.R. § 535.216. In a very real sense, the court of appeals in this case held that these administrative regulations, which this Court has held lack statutory authorization,[1] trumped a superceding Act of Congress.

No court has ever endorsed the Government's unorthodox suggestion, offered for the first time in this Court, that Congress should have to make a clear statement whenever legislation will abrogate an unratified executive order, so "that the President can make a fully informed decision whether to sign or veto [the] bill." BIO 14 n.2. That the Government even offers such a topsy-turvy justification only serves to underscore the serious threat to the separation of powers represented by the D.C. Circuit's judgment.

3. The Government maintains that "there is no basis for construing the recent appropriations laws as abrogating

[1] *See Dames & Moore v. Regan*, 453 U.S. 654, 675 (1981).

the commitment made by the President in the Algiers Accords," BIO 10, principally because the barrier to private suits imposed by the Algiers Accords was supposedly separate and distinct from Iran's sovereign immunity under the FSIA. The Government misses the point. Even if, as a theoretical matter, the FSIA and the Algiers Accords could be read as separate obstacles to petitioners' suit, it does not follow that a single congressional enactment would be unable to abrogate both. Indeed, the Government recognizes that Congress has "removed Iran's sovereign immunity for the acts in question, and thus allowed petitioners to obtain a judicial ruling on their claim that the Algiers Accords were invalid *ab initio*." BIO 10. This concession is fatal to the Government's position for two separate reasons.

A. The Government proposes that the petitioners sue Iran for acts arising out of their ordeal as hostages, seeking as relief "a judicial ruling" against Iran "on their claim" that the Algiers Accords were invalid *ab initio*. BIO 10. Tellingly, the Government uses the term "claim" in describing the action that petitioners may bring against Iran (whose sovereign immunity the Government concedes has been eliminated by congressional action). BIO 10. Yet the Algiers Accords purport to bar any and all "claims" against Iran. The Accords are not limited to claims for money damages. The Accords, 20 I.L.M. 223, 227 (1981), state in relevant part:

> [t]he United States will promptly withdraw all claims now pending against Iran before the International Court of Justice and will thereafter bar and preclude the prosecution against Iran of any pending or future claim of the United States or a United States national arising out of events

occurring before the date of this declaration related to (A) the seizure of the 52 United States nationals on November 4, 1979, (B) their subsequent detention, (C) injury to United States property or property of the United States nationals within the United States Embassy compound in Tehran after November 3, 1979, and (D) injury to the United States nationals or their property as a result of popular movements in the course of the Islamic Revolution in Iran which were not an act of the Government of Iran.

The implementing regulation states in relevant part:

1-101. The Secretary of the Treasury shall promulgate regulations: (a) prohibiting any person subject to U.S. jurisdiction from prosecuting in any court within the United States or elsewhere any claim against the Government of Iran arising out of events occurring before the date of this Order relating to (1) the seizure of the hostages on November 4, 1979, (2) their subsequent detention, (3) injury to United States property or property of United States nationals within the United States Embassy compound in Tehran after November 3, 1979, or (4) injury to United States nationals or their property as a result of popular movements in the course of the Islamic Revolution in Iran which were not an act of the Government of Iran . . .

1-102. The Attorney General of the United States is authorized and directed, immediately upon the issuance of regulations in accordance with Section 1-101, to take all appropriate measures to notify all appropriate courts of the existence of this Order and implementing regulations and the resulting termination of litigation.

A Treasury regulation prohibited the hostages "from prosecuting in any court within the United States . . . any claim against the Government of Iran." 31 C.F.R. § 535.216(a).

In its brief in the district court, the Government made clear that the Algiers Accords barred any judicial proceedings relating to the hostages' claims – not simply the award of money damages:

> The legal duty of the United States in this matter is not simply to relieve Iran from any judgment that might be entered in this case, but above and beyond that to "*preclude the prosecution* against Iran" of plaintiffs' claims. General Declaration, ¶ 11 (emphasis added). Hence, even short of entering a final judgment against Iran, any proceedings that have been or may be held in this Court that are directed toward that goal, including the scheduled hearing on damages, are in contravention of the United States' responsibilities under the Algiers Accords and, for that matter, federal law.[2]

Quite obviously, by authorizing the federal courts to exercise jurisdiction to adjudicate certain "claims" against Iran, Congress has taken an action which conflicts with the Algiers Accords. It has therefore abrogated the Accords, even under the Government's own argument that the appropriations riders simply removed Iran's sovereign immunity.

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[2] Ct. App. JA 37-38, Memorandum of Points and Authorities in Support of the United States' Emergency Motion To Intervene, and to Adjourn Hearing on Plaintiffs' Damages Pending Decision on the United States' Motion to Dismiss 20-21 (filed 10/12/01).

B. Moreover, it is evident that Congress meant to do much more than simply remove Iran's immunity from a suit testing the validity of the Algiers Accords *ab initio*. After all, this Court had already upheld the settlement of claims accomplished in the Algiers Accords as a permissible exercise of executive authority. *Dames & Moore v. Regan*, 453 U.S. 654, 686, 688 (1981). The Government's interpretation of the appropriations Acts would therefore render them an empty gesture – an opportunity for the petitioners to file suit, only for the purpose of having the district court pronounce the petitioners' claims extinguished two decades ago by an unratified executive agreement. The Government would interpret Congress's handiwork as "a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will." *Edwards v. California*, 314 U.S. 160, 186 (1941) (Jackson, J., concurring). Such an interpretation is foreclosed by the well-accepted canon that the legislature must not be presumed to do a futile thing. *E.g.*, *EEOC v. Commercial Prods. Co.*, 486 U.S. 107, 120-21 (1988).

Nor is it tenable to suppose that Congress was simply trying to clarify "the locus of responsibility for the dismissal of petitioners' claims." BIO 11. The nature of the Algiers Accords as an unratified executive agreement was already abundantly clear. No one has ever confused it with a treaty. And it is most unlikely that Congress would have repeatedly enacted appropriations riders to send any such message, which it could have accomplished far more simply through a non-binding resolution or by speeches on the legislative floor.

C. The Government's interpretation of the appropriations riders is further undermined by the D.C. Circuit's subsequent decision in *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024 (D.C. Cir. 2004). The issue is not a matter of reconciling two decisions by the same circuit, as the Government claims. BIO 16 n.5. Rather, the issue is the abrogation of the Algiers Accords. *Cicippio-Puleo* held that the Flatow Amendment creates a federal cause of action for victims of terrorism against individual officials, employees, and agents of foreign states that sponsor terrorism (including Iran), and that foreign state sponsors of terrorism will be amenable to suits in United States courts under state-law causes of action (such as those asserted by petitioners in this case) for assault, battery, false imprisonment, and the like. The D.C. Circuit remanded the *Cicippio-Puleo* case "to allow plaintiffs an opportunity to amend their complaint to state a cause of action under some other source of law, including state law. . . ." *Id.* at 1036.

Accordingly, the Flatow Amendment now provides plaintiffs with the opportunity to bring a federal cause of action for damages against individual officials, employees, and agents of Iran – with the untested opportunity to seek to hold Iran itself vicariously liable under respondent superior and other principles. The D.C. Circuit's own construction of the Flatow Amendment confirms that Congress has indeed abrogated the Algiers Accords.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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